IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-37

DCA NO. 3D05-1795

CARLOS INFANTES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the District Court of Appeal, Third District. Petitioner, CARLOS INFANTES, was the Defendant in the trial court and the Appellant in the District Court of Appeal. In this brief, Petitioner will be referred to as Infantes and the Respondent will referred to as the State.

STATEMENT OF THE CASE AND FACTS

Infantes appealed his judgment of guilt for the offense of burglary of an unoccupied structure and requested a new trial. Defendant was charged by information with petit theft (Count 1) and burglary (Count 2). The jury found the defendant not guilty as to Count 1 and on Count 2 found the defendant guilty as to a lesser included offense of burglary of an unoccupied structure.

In his second issue on appeal, Infantes argued that the trial court abused its discretion by failing to read back the testimony of a witness after it received the following note from the jury during deliberations:

can we hear the testimony of the first officer regarding his going into the tire store and lift [sic] the tarp and finding the defendant?

The opinion stated as follows:
..After receiving the note, the record demonstrates that the trial court ordered the jury to return to the courtroom and then instructed them as follows:

THE COURT: Ladies and gentlemen, I have your note here that says

can we have the testimony of the first officer regarding his going into the store and lifting the tarp and finding the defendant. Our answer to that. You have to relying[sic]on your own collective memory. I cannot offer any other information to you. Thank you very much. I wish I can give you more. But that is all I can give you. Thank you.

Infantes v. State, 941 So.2d 432, 434 (Fla. 3rd DCA 2006).

Under Florida Rule of Criminal Procedure 3.410, the trial court has wide latitude in the area of reading testimony to the jury. Indeed, "[a] trial court need only answer questions of law, not of fact, when asked by a jury and has wide discretion in deciding whether to have testimony reread." Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992)(no abuse of discretion found in refusing to reread testimony of witness and instructing jury to rely on collective memory of the evidence). We find no abuse of discretion in the trial court's refusal to reread the first officer's testimony and instructing the jury to rely on its collective memory. Moreover, it should be noted that the defendant did not object to this instruction.

The court then found that, because the trial court did not abuse its discretion on the two appellate issues raised, a new trial is not warranted. Thus, the judgment of the trial court was affirmed. Id. at 434.

Infantes thereafter filed a notice of intent to invoke this Court’s discretion in the case at bar. The only issue raised

herein is as to the second issue on direct appeal with respect to the jury's request to have portions of the testimony read back.

QUESTIONS PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF Avila v. State, 781 So.2d 413 (Fla. 4th DCA 2001); Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987); Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987) OR Lamonte v. State, 145 So.2d 889 (Fla. 2nd DCA 1962)? (REPHRASED).

SUMMARY OF THE ARGUMENT

The grounds set forth in Infantes' brief do not provide the Supreme Court of Florida with jurisdiction to review the Third District Court of Appeal's decision. The lower court's opinion does not expressly and directly conflict with the decisions of Avila v. State, 781 So.2d 413 (Fla. 4th DCA 2001); Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987;) Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987) or Lamonte v. State, 145 So.2d 889 (Fla. 2nd DCA 1962).

ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF Avila v. State, 781 So.2d 413 (Fla. 4th DCA 2001); Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987;) Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987) OR Lamonte v. State, 145 So.2d 889 (Fla. 2nd DCA 1962). (REPHRASED).

Infantes claims that the Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv),Fla. R. App. P., which provides for this Court's discretionary review of decisions of district courts of

appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The Court has explained express and direct conflict as appearing within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). The State maintains that the Court is without jurisdiction to review this decision on the grounds set forth in Infantes' brief, as no such express and direct conflict exists.

Infantes' brief improperly contains and argues facts that are not contained within the four corners of the lower court's opinion. When preparing a jurisdictional brief based on alleged decisional conflict, the only relevant facts are those facts contained within the four corners of the decisions allegedly in conflict. The Court is not permitted to base conflict jurisdiction on a review of the record. Reaves. Accordingly, this Court has specifically stated that "it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record". Reaves at 830, footnote 3.

Nevertheless, in support of his claim of jurisdiction, Infantes argues that the lower court's opinion is in conflict with Avila v. State, 781 So.2d 413 (Fla. 4th DCA 2001); Biscardi v. State, 511 So.2d 575 (Fla. 4th DCA 1987;) Huhn v. State, 511

So.2d 583 (Fla. 4th DCA 1987) and Lamonte v. State, 145 So.2d 889 (Fla. 2nd DCA 1962). Infantes has not cited to any specific case which expressly and directly conflicts with the lower court's opinion.

Infantes cited to Avila, Biscardi, and Huhn for the general proposition that the trial court may not mislead the jury into thinking that a read back is prohibited. He then cited to Lamonte as reversing despite the absence of an objection where the jury's question pertained to a material issue which would have been readily resolved by reading testimony to them, but the court replied that it was not able to comment on the evidence and could not tell the jury what was in the record.

It is well established by this Court that trial judges have broad discretion in deciding whether to read back testimony. Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992)."), cert. denied, ___ U.S. ___, 114 S. Ct. 321, 126 L. Ed. 2d 267 (1993). None of the district court cases cited to by Infantes establish an abuse of that discretion or a conflict with the lower court's opinion.

In Avila, the jury wanted to review a portion of the testimony of five alibi witnesses with regard to the timing of specific events. Although it was evident that the jury only requested a read back of a portion of the testimony of the

witnesses, the trial court believed that it was prohibited from providing a partial read back. Because the trial court was involved in another jury trial and thought that the full read back of the testimony of the requested witnesses would take a full day, it denied the request and told the jury to rely on their collective recollection. Based on Florida Rule of Criminal Procedure 3.410, it is within a trial court's discretion to provide a limited or partial read back of testimony, as long as that testimony is not misleading. The court rejected the State's argument that the issue was not preserved because defense counsel asked the trial court to read back the testimonies, thus making the court aware that defense counsel disagreed with the court's actions.

The appellate court in Avila found that the trial court's denial of the jury's request was an abuse of discretion because it misled the jury into thinking that the requested read back was prohibited. In reaching its holding, the appellate court noted that the trial court was hesitant to provide a full read back because of its involvement in another jury trial. Such a consideration should not have factored into the trial court's decision when exercising its discretion as to whether or not to provide the requested read back.

Clearly, the case at bar is factually distinguishable from Avila. Unlike Avila, the instant opinion expressly found that there was no defense objection to the trial court's response and instruction regarding the read back. For that reason alone, the matter would not be preserved and would be deemed to be waived. Additionally, the trial judge's exercise of its discretion in the instant case did not involve any extraneous reason, such as the other trial in Avila, which should not have been factored into the decision.

In Huhn, the trial court told the jury that there was no provision to have any testimony read back. Because Florida Rule of Criminal Procedure 3.410 permits but does not require the trial court to have testimony read back when so requested by a juror, the appellate court held that the trial court's remarks may have led some or all of the jurors to believe there was a prohibition on reading testimony back. Again, the instant case is distinguishable due to the lack of objection. Accordingly, the matter was not preserved for appellate review. Moreover, the trial court in Huhn expressly stated that no provision allowing for reading back testimony applies. This clearly was outright refuted by rule 3.410. In contrast, the judge in the instant case, merely informed the jury to rely on their own

collective memory and that it could not offer them any other information. The statement was not in contravention of 3.410.

In Biscardi, the appellate court found that the trial court committed reversible error where it refused to allow the jury to take notes and advised the jury that there was really no provision for reinstruction or to have testimony read back. Once more, the instant case is distinguishable because the issue was not preserved. Moreover, Biscardi involved the cumulative error of not allowing the jury to take notes and affirmatively misinforming them as to no provision for reinstruction or the reading back of testimony. No such cumulative error or affirmative misinformation exists in the instant case.

Lastly, in Lamonte, the appellate court found that despite defendant's lack of objection to the trial court's refusal to have requested testimony read to the jury, the matter constituted fundamental error as the jury's question pertained to a material issue. As opposed to the finding of fundamental error in Lamonte, in the instant case, the third district did not find that the trial court erred at all in denying the read back. Instead, the court expressly held that the trial court did not abuse its discretion in denying the read back. The court then went on to find that the matter was not preserved.

Thus, the cases cited to by Infantes do not expressly and directly conflict with the opinion below because no objection was made at trial and there was no abuse of discretion because there was no affirmative misadvice or incorrect factors considered in the denial of the request for the read back. The appellate court properly relied upon this Court's opinion in Coleman v. State in finding that there was no abuse of discretion in the trial court's refusing to reread testimony of witness and instructing the jury to rely on their collective memory of the evidence. Thus, based on the four corners of the subject opinion, Infantes has failed to show the existence of a direct and express conflict with Avila; Huhn; Biscardi; or Lamonte.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the Third District's opinion does not directly and expressly conflict with Avila; Huhn; Biscardi; or Lamonte. Thus, the State respectfully maintains that this Court lacks jurisdiction and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed to **CARLOS INFANTES**, #B439536/B1206U, Avon Correctional Institution, P.O. Box 1100, Avon Park, Florida 33826-1100, on this 2nd day of March, 2007.

LINDA S. KATZ
Assistant Attorney General

CERTIFICATION OF TYPE SIZE AND STYLE

Pursuant to the Rule 9.210(a)(2), Fla. R. App. P. regarding the type size of briefs filed in the Supreme Court of Florida, Respondent hereby certifies that the subject brief was typed in font Courier New, 12 point.

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Assistant Attorney General